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Feature

By Sylvia Mayer

It Is Time to Enhance Judicial Efficiency by Amending Rule 9031

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Bankruptcy courts handle more than 1 million cases yearly that range from simple consumer cases to complex multi-billion-dollar business cases. Thousands of parties appear before bankruptcy courts in various capacities, raising an infinite array of issues. The courts are both needed and expected to administer these cases fairly and efficiently. To do so, bankruptcy courts, as courts of equity, utilize a variety of tools to manage their dockets. However, one obvious tool remains outside of their reach: the use of special masters. Efforts are currently underway to change this.

What Is a Special Master?

A special master[1] is a neutral professional appointed by the court to serve a specific purpose in a case. Courts appoint special masters to assist with the full spectrum of case-management duties, including facilitating settlements, handling discovery disputes and providing technical input.[2]

What Prohibits the Use of Special Masters in Bankruptcy Cases?

Rule 9031 of the Federal Rules of Bankruptcy Procedure, "Masters Not Authorized," was enacted in 1983 and states that Rule 53 of the Federal Rules of Civil Procedure "does not apply in cases under the Bankruptcy Code." Civil Rule 53 governs the use of special masters in federal district courts. Because the ability to appoint special masters is an inherent power of the judiciary,[3] Civil Rule 53 does not create the right to appoint special masters. Instead, it imposes limitations and establishes guidelines for the use of special masters.

The Advisory Committee Notes from 1983 state, "This rule precludes the appointment of masters in cases and proceedings under the Code." As a result, Bankruptcy Rule 9031 has been interpreted as prohibiting both bankruptcy and district courts from appointing special masters in bankruptcy cases and adversary proceedings.

Why Do We Have Rule 9031?

Truthfully, no one really knows why Bankruptcy Rule 9031 was adopted in 1983, because no rationale was provided. However, there is much speculation, primarily stemming from opposition to requests to amend it.[4]

Have There Been Prior Attempts to Amend Bankruptcy Rule 9031?

In 1991, 1995, 1996, 2002 and 2009, the Advisory Committee on Bankruptcy Rules con-

1 On April 9, 2024, the Advisory Committee on the Federal Rules of Civil Procedure considered a request from the American Bar Association (ABA) to amend the Federal Rules of Civil Procedure to substitute the phrase "court-appointed neutral" for "master." *See, e.g.*, Advisory Comm. on Civil Rules (April 9, 2024), *available at* uscourts.gov/sites/default/files/2024-04-09_agenda_book_for_civil_rules_meeting_final_4-9-2024.pdf (Tab 18; unless otherwise specified, all links in this article were last visited on April 29, 2024); ABA Letter to H. Thomas Byron III, of the Admin. Office of the U.S. Courts (Feb. 12, 2024), *available at* courtappointedneutrals.org/resource-center/aba-president-letter-requesting-frcp-name-change-2024. The issue was deferred for further consideration at the committee's next meeting in October, including whether to adopt an alternative term such as "court adjunct officer." Notwithstanding the pending efforts to change the terminology, for purposes of this article, the phrase "special master" is used, as it is widely recognized. However, it should be noted that if the terminology is changed in the Federal Rules, it will also impact the Bankruptcy Rules.

2 *See, e.g.*, Thomas E. Willging, Laural L. Hooper, Marie Leary, Dean Miletich, Robert Timothy Reagan & John Shapard, "Special Masters' Incidence and Activity Report to the Advisory Committee on Civil Rules and Its Subcommittee on Special Masters," Fed. Judicial Ctr. (2000), *available at* fjc.gov/sites/default/files/2012/SpecMast.pdf.

3 *See, e.g., United States v. Black*, No. 16-20032-JAR, 2016 WL 6967120, at *3 (D. Kan. Nov. 29, 2016) ("[C]ourts have inherent authority to appoint Special Masters to assist in managing litigation.") (citing *Schwimmer v. United States*, 232 F.2d 855, 865 (8th Cir. 1956) (quoting *In re Peterson*, 253 U.S. 300, 311 (1920)); *see also* Donald L. Swanson, "Special Masters Are Needed in Bankruptcy, Part 4: Inherent Authority Should Not Be Denied," Mediatbankry (March 5, 2024), *available at* mediatbankry.com/2024/03/05/special-masters-are-needed-in-complex-bankruptcy-cases-part-4-inherent-authority-should-not-be-denied.

4 *See, e.g.*, ABA Letter to Byron, *supra* n.1 at 6-12; Merril Hirsh & Sylvia Mayer, "Time to Stop Hamstringing Bankruptcy Judges: Amending Bankruptcy Rule 9031 to Recognize and Permit the Use of Court-Appointed 'Masters,'" *ABA Judicial Div. Judges Journal*, Vol .61, No. 4 (Fall 2022), 22-24.

sidered — and effectively rejected — requests to amend Bankruptcy Rule 9031. The meeting minutes for each prior consideration provide insight into the concerns raised then,[5] most of which fall into three categories: concerns that (1) are now moot due to substantial revisions to Civil Rule 53; (2) seem dated given the current operation of bankruptcy courts; and (3) can be resolved by adding language to any amendment.

Moot Concern: Infringement on Authority

Old Civil Rule 53 required courts to accept a special master's findings unless they were clearly erroneous. It was feared that this heightened review infringed on bankruptcy court authority. However, in the 2003 rewrite of Civil Rule 53, the clearly erroneous review standard was changed to *de novo* review.

Moot Concern: Usurpation or Dilution of Authority

Under old Civil Rule 53, a master's primary role was to conduct trials. It was originally feared that this role usurped or diluted the bankruptcy court's power. However, since 2003, Civil Rule 53 has contemplated that courts will utilize special masters to assist with the full spectrum of case administration of pre- and post-trial matters. Consequently, since 2003, instead of potentially usurping or diluting the court's role, Civil Rule 53 utilizes special masters to enhance the court's ability to manage their cases.

Dated Concern: Unconstitutional

A question was raised about the constitutional authority for an Article I judge to appoint a special master. However, many other Article I courts can appoint special masters. For example, judges in the District of Columbia Superior Court (an Article I court) can appoint special masters.[6] U.S. Magistrate Judges can use Civil Rule 53 to appoint masters.[7] The U.S. Court of Federal Claims (an Article I court) maintains an Office of Special Masters.[8] Judges in the U.S. Court of Appeals for Veterans Claims (an Article I court) also have the authority to appoint special masters.[9] There is no logical basis to distinguish between the inherent authority available to bankruptcy judges and the inherent authority available to other Article I judges who can appoint special masters.

Dated Concern: Adequate Alternatives Exist

Some prior resistance to amending Bankruptcy Rule 9031 rested on a belief that adequate alternatives exist. However, experience belies this assumption, and the easiest example is mass tort cases. Courts handling mass tort litigation outside of bankruptcy frequently utilize the services of special masters to handle (among other things) time-consuming and detailed discovery disputes.

It is nonsensical to use a special master in such litigation outside of bankruptcy and then, if the defendant files for bankruptcy, deprive the bankruptcy court of the same tool to manage such discovery disputes. Hon. **Michael B. Kaplan** of the U.S. Bankruptcy Court for the District of New Jersey, who has presided over mass tort bankruptcy cases, has expressed this very frustration.[10]

Some point to the court's ability to instead appoint mediators, examiners and experts of Rule 706 of the Federal Rules of Evidence (FRE) as viable alternatives. However, each of these neutrals serves an entirely different function:

- Mediators are appointed or selected consistent with the authority granted under the Federal Mediation Act[11] to help parties reach a consensual resolution. Mediators act independently of the court and, given the importance of confidentiality in mediation, do not report to the court about the substance of the mediation.
- Examiners are appointed to conduct an investigation and submit a report. While some examiners are appointed with "special powers," those powers are limited, and the focus is not on case management.
- FRE 706 experts are subject-matter experts appointed solely to opine on a specific topic.

Mediators are focused on settlement, examiners are focused on examining, and FRE 706 experts are focused on opining. None are appointed or focused on case administration.

Dated Concern: No Need and *Stare Decisis*

Some have resisted the idea of amending Bankruptcy Rule 9031 out of respect for prior decisions and a perception that there is no such need. As the Business Rules Subcommittee has acknowledged, nothing prevents the Judicial Conference from revisiting the amendment of rules.[12] Moreover, there is a clear and present need for this amendment, many current and former bankruptcy judges have expressed this need, and momentum is building.[13]

Resolvable Concern: Cronyism

More than 40 years ago, cronyism was a significant concern, but much has changed. In 1984, a year after Bankruptcy Rule 9031 was enacted, the Bankruptcy Amendment Act passed, which changed the method of appointing bankruptcy judges. In 1986, the U.S. Trustee Program was expanded to 48 states to, among other things, mitigate lingering concerns about cronyism.[14] In the other

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5 *See* Meeting Minutes of Advisory Comm. on Bank. Rules for the following dates: June 20-21, 1991, at p. 11, *available at* uscourts.gov/sites/default/files/fr_import/BK06-1991-min.pdf; Sept. 7-8, 1995, at pp. 119-21, *available at* uscourts.gov/sites/default/files/fr_import/min-bk9.pdf; Sept. 26-27, 1996, at pp. 3-5, *available at* uscourts.gov/sites/default/files/fr_import/bk9-2696.pdf; Oct. 10-11, 2002, p. 6, *available at* uscourts.gov/sites/default/files/fr_import/BK2003-04.pdf; Oct. 1-2, 2009, pp. 137-44, *available at* uscourts.gov/sites/default/files/fr_import/BK2009-10.pdf.

6 D.C. Superior Court Rule 53, *available at* dccourts.gov/sites/default/files/2017-05/Civil%20Rule%2053.%20Masters.pdf.

7 *See, e.g., FTF Lending LLC v. Blue Int'l Grp. LLC*, 2023 U.S. Dist. LEXIS 210407 (M.D. Fla. Sept. 12, 2023), *available at* casetext.com/case/ftf-lending-llc-v-blue-intl-grp-1.

8 "Special Masters: Biographies," U.S. Court of Fed. Claims, *available at* uscfc.uscourts.gov/special-masters-biographies.

9 *See, e.g., Amanda J. Wolfe and Peter E. Boerschinger v. Denis McDonough, Secretary of Veterans Affairs*, No. 18-6091 (Vet. App. 2021), *available at* cases.justia.com/federal/appellate-courts/cavc/18-6091/18-6091-2021-03-24.pdf?ts=1616675478.

10 *See* Letter from Hon. Michael B. Kaplan, dated Jan. 10, 2024, to the Comm. on Rules of Practice and Procedure, *available at* uscourts.gov/sites/default/files/24-bk-a_suggestion_from_judge_michael_kaplan_-_rule_9031_0.pdf.

11 28 U.S.C. § 651, *et seq.*

12 Subcomm. on Bus. Issues Memorandum to the Advisory Comm. on Bankr. Rules, included in the Meeting Minutes of Advisory Comm. on Bankr. Rules, pp. 142-43 (Oct. 1-2, 2009), *available at* uscourts.gov/sites/default/files/fr_import/BK2009-10.pdf.

13 *See, e.g.*, Letter from Hon. Michael B. Kaplan, *supra* n.10; Letter from ABA President Mary Smith, dated Feb. 12, 2024, to the Comm. on Rules of Practice and Procedure at p. 12, *available at* uscourts.gov/sites/default/files/24-bk-c_suggestion_from_aba_-_rule_9031.pdf (referring to support of judges involved with ABA's Judicial Division and acknowledging input of Hon. **Elizabeth S. Stong** of U.S. Bankruptcy Court of Eastern District of New York and Hon. **Frank J. Bailey** (ret.), formerly of U.S. Bankruptcy Court for District of Massachusetts).

14 *See* H.R. Rep. 595, 95th Cong. 1st Sess. 107, *reprinted in* U.S. Code Cong. & Ad. News 1978, 5963, 6069.

two states (Alabama and North Carolina), Bankruptcy Administrators serve this function.

Nonetheless, if cronyism concerns remain, there is an obvious solution. Courts could be authorized to determine whether a special master should be appointed, then — just as with trustees and examiners — the U.S. Trustee's office or (where applicable) the Bankruptcy Administrator's office could fill that role.

Resolvable Concern: Lobbying for Positions

Along the same lines as cronyism, a concern that has been raised is that potential special masters might lobby judges for appointments. Similar to concerns about cronyism, this lobbying concern could be addressed by giving courts the authority to determine whether a special master should be appointed, then tasking the office of the U.S. Trustee or Bankruptcy Administrator to fill that role.

Resolvable Concern: Unnecessary Costs and Complexity

Some have expressed concerns that allowing the appointment of special masters would add unnecessary costs and complexity. However, authorizing the appointment does not mandate the appointment. Instead, it provides one more tool that courts can use in managing their bankruptcy cases. In some cases, eliminating the option to appoint a special master increases the costs and delays in the bankruptcy case.

As a general rule, courts appoint special masters sparingly and only when needed. To mitigate this concern, the rule's language could incorporate a core principle of § 503(b) of the Bankruptcy Code and provide that a special master can be appointed only to the extent needed to facilitate the preservation of the estate.

Resolvable Concern: Compensation

One concern previously raised was how to compensate a special master. However, if a special master is appointed to facilitate the preservation of the estate, then compensation is *de facto* a necessary and reasonable cost of preservation of the estate. As is contemplated in Civil Rule 53, the appointment order should establish the process and procedure for special masters to file fee applications and be compensated.

Why Should Bankruptcy Rule 9031 Be Amended Now?

The current volume, complexity, depth and breadth of bankruptcy cases pose a significant challenge to the efficient administration of bankruptcy cases. Bankruptcy courts can appoint mediators, examiners, fee examiners and FRE 706 experts to assist in the administration of bankruptcy cases, but they have no similar tools available to assist with managing the other complex, time-consuming or overwhelming volumes of issues that impede resolution of the case. As Chief Judge Kaplan wrote:

> On a personal level with my current caseload, as well as observing other complex chapter 11 cases across the country, I find it evident that bankruptcy judges handling mass tort chapter 11 bankruptcies, together with large financial institution and cryptocurrency filings, have struggled to employ the tools available under the [Bankruptcy] Code and [B]ankruptcy [R]ules to address complex issues such as corporate asset valuations, claim estimations, fraudulent-transfer litigation and challenges to prefiling liability-management transactions. These tools include the appointment of mediators, [FRE] 706 experts and examiners; yet, each of these options can give rise to significant costs and have inherent limitations — ultimately tort victims, equityholders and other creditors are forced to finance the costs associated with endless discovery battles and challenges to these appointments, along with the substantive underlying litigation. The appointment of a special master would relieve the burden on the bankruptcy courts, allowing the chapter 11 case to proceed without being held hostage to litigation/discovery "overload." By way of limited example, the excessive court time and professional costs associated with litigation over straightforward issues such as the language used in victim questionnaires or proofs of claim would clearly benefit from the independent oversight of a special master.[15]

What Current Efforts Are Underway to Amend Bankruptcy Rule 9031?

The process for amending the Federal Rules of Bankruptcy Procedure is complex.[16] It begins with a request, which is then considered by a subcommittee of an advisory committee. It could then be referred to the applicable advisory committee for review, which then might be recommended to the standing committee for consideration, deferred for further consideration or remanded back to the subcommittee for further evaluation. There are many more steps after that. As of May 2024, the process to amend Bankruptcy Rule 9031 is entering the fourth step.

On Jan. 10, 2024, Chief Judge Kaplan submitted a letter to the Judicial Conference of the United States Committee on Rules of Practice and Procedure requesting the amendment of Bankruptcy Rule 9031 based on his experience and challenges in managing large, complex chapter 11 cases.[17] On Feb. 12, 2024, the ABA submitted a letter supporting Judge Kaplan's request and providing additional support for amending Bankruptcy Rule 9031.[18] The ABA's letter is the culmination of more than five years of work involving efforts by, among others, various committees within the ABA and the National Conference of Federal Trial Judges.

These two requests were considered at the February 2024 meeting of the Judicial Conference of the United States Bankruptcy Rules Advisory Committee's Business Rules Subcommittee. At that meeting, the Subcommittee voted to refer the proposal to the Judicial Conference of the United States Bankruptcy Rules Advisory Committee.

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15 *See* Letter from Hon. Michael B. Kaplan, *supra* n.10.

16 *See, e.g.*, "Overview for the Bench, Bar, and Public," U.S. Courts, *available at* uscourts.gov/rules-policies/about-rulemaking-process/how-rulemaking-process-works/overview-bench-bar-and-public (providing step-by-step outline of rulemaking process).

17 *See* Letter from Hon. Michael B. Kaplan, *supra* n.10.

18 Letter from Mary Smith, *supra* n.13.

On April 11, 2024, the Judicial Conference of the United States Bankruptcy Rules Advisory Committee considered the proposal.[19] After a discussion of prior efforts to revise the rule and those concerns were raised, the proposal was remanded to the Business Rules Subcommittee for further consideration, including working with the Federal Judicial Center to survey judges to explore further, including whether they see a need for special masters in bankruptcy cases, have desired to use one previously, the roles they believe special masters could serve, and how they have proceeded in the absence of this authority.

How Could Masters Be Utilized in Bankruptcy Cases if Bankruptcy Rule 9031 Were Amended?

If such an amendment were enacted, then the potential uses would be infinite. When appropriate for use in a case or proceeding to preserve the estate, the role of a special master could be narrowly tailored to the specific and unique needs presented. Some of the many potential roles may include (1) claims evaluator or estimator; (2) damages evaluator; (3) discovery compliance monitor, facilitator, mediator or referee; (4) protocol advisor or monitor of electronically stored information; (5) fee adjudicator; (6) information-gatherer; (7) pretrial manager; (8) privilege log reviewer; (9) settlement advisor, compliance monitor or facilitator; (10) technical advisor on identified specialized areas; or (11) valuation advisor.

The time has come. While certainly not needed in every bankruptcy case, it is time to amend Bankruptcy Rule 9031 to allow courts to utilize special masters — when needed — and enhance their case-management tools for bankruptcy cases. abi

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19 *See* Advisory Comm. on Bankr. Rules (April 11, 2024), *available at* uscourts.gov/sites/default/files/2024-04-11_agenda_book_for_bankruptcy_rules_meeting_final.pdf (Tab 8B).